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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 36116
	)	
vs.	)	
	)	
CLIFFORD STEWART,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CASSIA

HONORABLE MICHAEL R. CRABTREE
District Judge

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State of Idaho

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FILED - COPY
OCT - 1 2009
Supreme Court ____ Court of Appeals ____
Entered on ATS by: ____

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

Nature of the Case

Clifford Stewart appeals from his conviction for felony stalking.

Statement of the Facts and Course of the Proceedings

After he waived his preliminary hearing (R., p. 30), the state charged Stewart with felony stalking and misdemeanor violation of a no-contact order. (R., pp. 32-34, 54-55.) The state's probable cause affidavit stated that the victim "has been receiving emails at her job in Twin Falls from Clifford Stewart ... in violation of an active no contact order ...." (R., pp. 9, 57.) The affidavit also stated that Stewart had been previously convicted of stalking the victim and a condition of his probation was to have no contact with the victim. (R., p. 58.)

Stewart filed a motion to dismiss, asserting the information did not allege a course of conduct, which he claimed was a necessary element of the crime. (R., p. 51.) The district court concluded that the information was not sufficient, but allowed the state to amend. (R., pp. 68-73, 92.) The second amended information alleged felony stalking as follows:

> That the defendant, CLIFFORD RANDALL STEWART, on or between Spring 2006, to the 31st day of December, 2007, in the County of Minidoka and the County of Cassia, State of Idaho, did feloniously engage in a course of conduct that seriously alarmed, annoyed or harassed another person, [G.J.], by sending her unsolicited emails, leaving her unsolicited love notes, giving her gifts, calling her on the telephone, and by repeatedly displaying affection towards [G.J.] by various means and on numerous occasions, where the actions constituting the offense are in violation of a no contact order; or where the defendant had been previously convicted of stalking in the second degree within the last seven years; or where the actions constituting this offense are in violation of a condition of probation.

(R., pp. 94-95.)

Stewart filed another motion to dismiss "upon the grounds and for the reason that the State's Affidavit of Probable Cause does not state a course of conduct, as is necessary in the Statues [sic]." (R., p. 97.) After a hearing on the motion (R., p. 103), the district court denied the motion (R., pp. 104-09).

Stewart later pled guilty by plea agreement in which he preserved his right to appeal from the motion to dismiss. (R., pp. 122-24, 134-36.) The district court thereafter entered judgment. (R., pp. 145-48.) Stewart filed a timely appeal from the judgment. (R., p. 6.)

ISSUE

Stewart states the issue on appeal as:

> Did the district court err when it denied Mr. Stewart's motion to dismiss the felony stalking charge?

(Appellant's brief, p. 8.)

The state rephrases the issue as:

Has Stewart failed to demonstrate on appeal that he proved that the current felony stalking charge is barred under principles of double jeopardy by his previous misdemeanor stalking conviction?

ARGUMENT

Stewart Has Failed To Demonstrate On Appeal That He Proved That The Current Felony Stalking Charge Is Barred Under Principles Of Double Jeopardy By His Previous Misdemeanor Stalking Conviction

A. Introduction

The trial court noted that it "has not been provided with any information regarding which of the acts by the Defendant form the basis for" the prior misdemeanor conviction, but assumed that the prior stalking conviction "arose out of the same course of conduct or acts that form the basis for the instant prosecution." (R., p. 106.) The district court framed the issue as "whether, in the instant prosecution, the State is permitted [to] use acts of the Defendant that led to his prior misdemeanor stalking conviction to prove the element of a 'course of conduct' sufficient to satisfy § 18-7905(1)." (R., p. 106.) The court then denied Stewart's motion, reasoning that the statute as written applied to Stewart's conduct and that Stewart had failed to demonstrate that the prior conviction acted as a bar to the current prosecution. (R., pp. 106-09.) Stewart argues that the district court erred. (Appellant's brief, pp. 10-20.) Application of the correct legal standards to this issue, however, shows that there is no double jeopardy problem because the statute is being applied in this case exactly as the legislature intended.

B. Standard Of Review

Whether a prosecution complies with the constitutional protection against being placed twice in jeopardy is a question of law subject to free review. State v. Hussain, 143 Idaho 175, 176, 139 P.3d 777, 778 (Ct. App. 2006).

C. Stewart Presented No Evidence Whatsoever That His Prior Conviction Encompassed The Conduct As Currently Charged

The Double Jeopardy Clause applies to prevent multiple prosecutions for "the same offence." U.S. Const., Amend. V. The underlying predicate of Stewart's double jeopardy argument is his factual claim that this is the "same offence" as gave rise to his prior misdemeanor conviction because the current felony stalking charge is based, with the exception of one incident of harassment of the victim (an e-mail), on the conduct for which he was already convicted. (Appellant's brief, pp. 10-12.) This factual claim is, however, not supported by the record. Because Stewart failed to prove that the conduct underlying his prior misdemeanor conviction was also the conduct underlying the current felony charge, his double jeopardy claim fails.

As set forth above, the state charged Stewart with stalking as follows:

> That the defendant, CLIFFORD RANDALL STEWART, on or between Spring 2006, to the 31st day of December, 2007, in the County of Minidoka and the County of Cassia, State of Idaho, did feloniously engage in a course of conduct that seriously alarmed, annoyed or harassed another person, [G.J.], by sending her unsolicited emails, leaving her unsolicited love notes, giving her gifts, calling her on the telephone, and by repeatedly displaying affection towards [G.J.] by various means and on numerous occasions, where the actions constituting the offense are in violation of a no contact order; or where the defendant had been previously convicted of stalking in the second degree within the last seven years; or where the actions constituting this offense are in violation of a condition of probation.

(R., pp. 94-95.) Of course none of the actual charge itself states that any of the course of conduct alleged formed the basis for the prior conviction.

Stewart extrapolates from the date of the prior conviction, August of 2007, that all acts of stalking prior to August of 2007 must have formed the basis for the prior conviction. (Appellant's brief, pp. 10-12.) He compares part of the affidavit of probable cause that states that Clifford was charged for the misdemeanor for conduct between Spring 2006 to July 30, 2007 (Appellant's brief, p. 12 (citing R., p. 90)) with the state's *supplemental* discovery response (Appellant's brief, pp. 12-13), coupled with a reference to a single e-mail in December of 2007 in the affidavit (Appellant's brief, p. 12),[1] and concludes that because the e-mails listed on the supplemental discovery response all occur between January 13, 2007 and July 28, 2007, that "the evidence that the State was intending to rely on was evidence of the same course of conduct for which Mr. Stewart had previously been sentenced" (Appellant's brief, p. 13).

This argument is devoid of merit for many reasons, including, but not limited to the following: (1) Stewart may not rely on the evidentiary value of the supplemental discovery response because he never asked the district court to consider that response as evidence of what conduct formed the basis of the prior conviction, State v. Mitchell, 124 Idaho 374, 376 n.1, 859 P.2d 972, 974 n.1 (Ct. App. 1993) ("It is axiomatic that an appellate court will not consider new evidence that was never before the trial court."); (2) the discovery response is *supplemental*, necessarily meaning that it does not represent the entirety of the "evidence the State was intending to rely on" as claimed by Stewart (Appellant's

[1] The state notes that because Stewart waived his preliminary hearing the probable cause affidavit was entirely gratuitous and that nothing in the record actually reflects what evidence the state would have submitted at trial.

brief, p. 13); (3) even though the e-mails listed in the supplemental response were dated within the time-frame of the underlying conviction there is no evidence that they were part of or necessary to that conviction; (4) the probable cause affidavit clearly states that the victim complained "that she has been receiving *emails* at her job in Twin Falls" and that "these *emails* are in violation of an active no contact order" (R., p. 88 (*emphasis added*)). That the rest of the affidavit focuses on a single e-mail (R., p. 89), does not in any way prove that the state had evidence of only a single e-mail, as opposed to the "emails" the victim stated she had been receiving in violation of the no-contact order.

In this case Stewart did not present the charging document related to the underlying misdemeanor. He did not submit any evidence of what the prosecution presented in the trial of that charge. In short, he presented no specific evidence whatsoever of what conduct formed the basis of the misdemeanor stalking charge. His entire claim was based on assumptions and speculation. It was not enough to show that the state's evidence would include evidence of his prior conduct; Stewart bore the burden of showing that the state in this case was prosecuting him for the same offense for which he had already been convicted. United States v. Felix, 503 U.S. 378, 385-87 (1992).

The district court "accept[ed] as true" the claim that "the Minidoka conviction arose out of the same course of conduct or acts that form the basis for the instant prosecution," but also stated: "The Court has not been provided with any information regarding which of the acts by the Defendant form the basis for the Minidoka County conviction." (R., p. 106.) Because Stewart failed to present

any evidence proving his claim that the acts underlying his previous conviction would be the same acts supporting the current felony charge, he failed to show that double jeopardy was implicated in this case. Where the lower court reaches the correct result by relying on an incorrect legal theory, the appellate court will affirm the result under the correct legal theory. McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999); State v. Avelar, 129 Idaho 700, 704, 931 P.2d 1218, 1222 (1997); see also State v. Rhoades, 134 Idaho 862, 864, 11 P.3d 481, 483 (2000). Because, as noted by the district court, Stewart presented no evidence to support his claims, the district court should be affirmed on the basis that the record does not show that the factual underpinnings of Stewart's claim are correct.

D. Even Assuming There Was Only One Act Of Stalking That Did Not Form The Basis Of The Prior Conviction, Stewart Has Failed To Show The Current Charge Of Stalking Was Barred By Double Jeopardy

The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. V. This Clause affords a defendant three basic protections. It protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple criminal punishments for the same offense. Schiro v. Farley, 510 U.S. 222, 229 (1994); State v. McKeeth, 136 Idaho 619, 622, 38 P.3d 1275, 1278 (Ct. App. 2001).

In Garrett v. United States, 471 U.S. 773 (1985), the Supreme Court of the United States decided a double jeopardy issue very similar to the one before this

Court. The issue in that case was whether it violated the second and third double jeopardy protections stated above (second prosecution after conviction and multiple punishments for same offense) to use facts underlying a prior drug trafficking conviction to prove a predicate act of a Continuing Criminal Enterprise. Id. at 775-77.[2]

As to whether a second prosecution was prohibited because of the prior conviction, the Court applied a two-step analysis. Id. at 778-893. The first step of the analysis is one of legislative intent: "Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature ... intended that each violation be a separate offense." Id. at 778. The second step is to determine whether the prosecution is for the "same offence" within the meaning of the Double Jeopardy Clause. Id. at 786. The analysis of these two prongs in Garrett shows that there was no double jeopardy bar in this case.

Review of the statutory provisions shows a legislative intent that a prior conviction for misdemeanor (second degree) stalking does not bar a conviction for felony (first degree) stalking where the defendant continues to stalk the same victim by continuing the same course of stalking conduct after his conviction. The interpretation of a statute must begin with the literal words of a statute. State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003). Those words must

[2] The state acknowledges that the analysis applicable to this case would likely not apply if there had been a prior acquittal, because "the Double Jeopardy Clause attaches special weight to judgments of acquittal." Tibbs v. Florida, 457 U.S. 31, 41 (1982).

be given their plain, usual, and ordinary meaning and the statute must be construed as a whole. Id. Where the language of a statute is plain and unambiguous, the court must give effect to the statute as written, without engaging in statutory construction. State v. Rhode, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); State v. McCoy, 128 Idaho 362, 365, 913 P.2d 578, 581 (1996). The court assumes that the legislature meant what is clearly stated in the statute, unless the result is "palpably absurd." Schwartz, 139 Idaho at 362, 79 P.3d at 721; Rhode, 133 Idaho at 462, 988 P.2d at 688.

The relevant language of the felony stalking statute provides: "A person commits the crime of stalking in the first degree if the person *violates section 18-7906, Idaho Code*, and ... The actions constituting the offense are in violation of a ... no contact order ... or ... are in violation of a condition of probation or parole ...." I.C. § 18-7905(1) (emphasis added). A violation of section 18-7906, in turn, requires a "course of conduct." I.C. § 18-7906(1), defined as "repeated acts of nonconsensual contact involving the victim ..." I.C. § 18-7906(2)(a). Thus, under the plain language of this section, a person who "violates section 18-7906" and whose actions are in violation of a no-contact order or condition of probation commits a felony stalking, without regard for whether some of the stalking course of conduct has been subject to a prior charge or conviction.

Stewart would essentially have this Court read this statute as applying only to a person who "violates section 18-7906 [and has not been previously convicted for this conduct]" and meets the felony element. He argues that the statute requires that the course of conduct be conduct entirely post-dating any

prior conviction. (Appellant's brief, pp. 10-15.) This argument makes no sense under either the plain language or the obvious intent of this statute. It simply makes no sense to conclude that this statute makes continued stalking of a victim a felony only if the defendant engages in two incidents of harassment after imposition of a no-contact order or condition of probation. The legislature here intended that conduct like Stewart's, where he continued the same course of harassment of the same victim after conviction and entry of a no-contact order and condition of probation, to fall within the ambit of the felony statute.[3] The legislature intended this statute to apply exactly as it has been applied in this case.

The second prong of the double jeopardy analysis, whether the charged crime is the "same offence" as the prior stalking, is also met in this case. In reviewing this prong of the test in Garret the Court distinguished Brown v. Ohio, 432 U.S. 161 (1977), where the crimes of "joyriding" and theft were the "same offence," on the basis that in Brown the "very same conduct" supported both charges; "Every moment of [Brown's] conduct was as relevant to the joyriding

[3] The state also submits that legislative intent that a defendant who continues stalking the same victim after his misdemeanor conviction is guilty of a felony for the first new stalking incident is shown by the legislative history of this law. Although our legislative history is less detailed that that of Congress, the state has included with this brief the bill's statement of purpose (Appendix A), and the relevant minutes from the hearing of the House Judiciary, Rules and Administration Committee for January 27, 2004 (Appendix B), the relevant minutes from the hearing of the House Judiciary, Rules and Administration Committee for February 17, 2004 (Appendix C), and the relevant minutes and exhibit from the hearing of the Senate Judiciary and Rules Committee for March 3, 2004 (Appendix D). This legislative history shows legislative intent that stalking preceding entry of a no-contact order or condition of probation be treated as part of the course of conduct.

charge as it was to the auto theft charge." Garrett, 471 U.S. at 787. In contrast, Garrett's prior conviction covered only a few days out of the course of the Continuing Criminal Enterprise, and the CCE was not completed until after Garrett had already been charged on the trafficking offense. Id. at 788. The Court stated:

> Whenever it was during the 5½-year period alleged in the indictment that Garrett committed the first of the three predicate offenses required to form the basis for a CCE Prosecution, it could not then have been said with any certainty that he would necessarily go ahead and commit the other violations required to render him liable on a CCE charge.

Id. at 788-89. Likewise, in this case, when Stewart initially stalked this victim it could not have been said with any certainty that he would continue that conduct after imposition of a condition of probation and a no-contact order. Although there is overlap, as in Garrett the state was not charging the same crime for purposes of double jeopardy.

The Court in Garrett then went on to reject an argument either identical to Stewart's or so close as to make no difference. The Court stated: "We have steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause." Id. at 790. The Court instead referred to Diaz v. United States, 223 U.S. 442 (1912), where the Court concluded it did not violate the Double Jeopardy Clause to prosecute Diaz for murder after his conviction for assault and battery where his victim later died of injuries inflicted during that attack. Garrett, 471 U.S. at 791. Like Diaz, where the state lacked the ability to put the defendant in jeopardy for murder before his victim died, Garrett had not completed his Continuing Criminal Enterprise before being charged with the

trafficking offense. Garrett, 471 U.S. at 791. Likewise, the state lacked the ability to put Stewart in jeopardy for felony stalking until after his conviction and entry of the no-contact order and the condition of probation and Stewart's actions in resuming his stalking of the victim. The act of resumption of the same stalking course of conduct, which could not have been anticipated at the time of the first prosecution, makes this a different offense for purposes of double jeopardy.

The Garrett Court next determined that the double punishment bar had not been violated. The Court stated that the "Double Jeopardy Clause does no more than prevent the sentencing court from proscribing greater punishment than the legislature intended." Garrett, 471 U.S. at 793 (internal quotes and citations omitted). Here the Idaho Legislature certainly intended that a stalker who continues his course of conduct after being convicted be punished for the new offense. I.C. § 18-7905(4). Disallowing cumulative sentences would here have the "anomalous effect" of preventing punishment of defendants who continue stalking the same victim after a misdemeanor conviction. See Id. at 793-94.

The analysis and the result in Garrett apply here. The Idaho Legislature intended that a stalker convicted of a misdemeanor and ordered to have no more contact with that victim would commit a felony if he continued his stalking of that victim. The Legislature did not intend that the defendant get one "free" harassment of an already stalked victim after entry of a no-contact order or condition of probation. This law does not violate the prohibitions against double jeopardy because it involves a continuation of the conduct, and is therefore not the "same offence" in either law or fact. Nor are there multiple punishments for

the same crime because the continuation of the course of conduct creates a factually and legally new and distinct crime. Thus, even assuming that Stewart continued his course of stalking behavior by sending only one e-mail after his misdemeanor conviction, double jeopardy does not bar his trial, conviction or sentence for felony stalking.

Stewart argues that where a crime is a single course of conduct the state may not arbitrarily charge the defendant with multiple crimes. (Appellant's brief, pp. 13-15.) While this is generally true it has no application to the facts of this case or the interpretation of I.C. § 18-7905. Stewart relies on Brown v. Ohio, 432 U.S. 161 (1977), for this proposition. (Appellant's brief, pp. 13-14.) As shown above, the Supreme Court of the United States distinguished Brown in Garrett, 471 U.S. at 787-88. That analysis applies here. If Stewart's argument is taken to its logical extreme, Stewart would be granted immunity against prosecution from stalking the same victim by the reasoning he proposes, because at least in theory all future stalking would merely be part of the same course of conduct he started in 2006. The state is not, as set forth in Garrett, prosecuting Stewart for the same course of conduct under double jeopardy.

Stewart also argues that the felony and misdemeanor stalking are not different crimes for purposes of double jeopardy under the standard of Blockburger v. United States, 284 U.S. 299 (1932). (Appellant's brief, pp. 16-19.) However, "the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history." Garrett, 471 U.S. at 779. It is merely a rule of statutory construction that does not control where there

is "a clear indication of contrary legislative intent." Albernaz v. United States, 450 U.S. 333, 340 (1981). As shown above, the Idaho Legislature's intent to bring within the ambit of the felony stalking statute those who continue stalking their victims after conviction or issuance of a no-contact order or condition of probation is clear in the statute; therefore this argument is without merit.

The prosecution and conviction of Stewart in this case does not implicate the Double Jeopardy Clause. As stated by the Supreme Court of the United States about the underlying purposes of that clause:

> As we have explained on numerous occasions, the bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence.

Ohio v. Johnson, 467 U.S. 493, 498-99 (1984) (holding that the state was not barred from pursuing murder and aggravated robbery charges after defendant's guilty pleas to involuntary manslaughter and theft in the same case). See also Tibbs v. Florida, 457 U.S. 31 (1982) (concerns of double jeopardy not implicated where appellate court grants new trial based on weight of evidence instead of sufficiency of evidence); United States v. Scott, 437 U.S. 82 (1978) (double jeopardy concerns not implicated where defendant seeks acquittal on grounds other than sufficiency of state's evidence); United States v. Tateo, 377 U.S. 463 (1964) (grant of immunity from punishment too high a price under double jeopardy where guilty plea, entered after jury was sworn, was reversed on appeal). Where the state has prosecuted and convicted a defendant for part of an ongoing course of criminal conduct, these concerns are not necessarily

implicated when the state subsequently prosecutes for the continued and completed course of criminal conduct. Garrett v. United States, 471 U.S. 773 (1985). Here the state is not seeking to wear down Stewart and obtain a conviction or sentence it has been denied. On the contrary, Stewart of his own will continued his same course of conduct following his prior conviction, elevating his continued course of conduct to a felony in the eyes of the law. Stewart has failed to show that prosecuting him for his entire course of conduct violates the protections against double jeopardy.

CONCLUSION

The state respectfully requests this Court to affirm Stewart's conviction for felony stalking.

DATED this 1st day of October 2009.

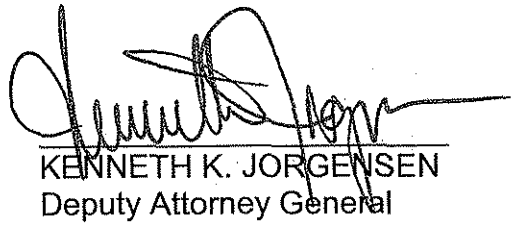
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of October 2009 served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm

APPENDIX A

STATEMENT OF PURPOSE

RS 14049

This legislation breaks stalking out into first-degree and second-degree stalking. First-degree stalking is a felony and is committed when an individual commits second-degree stalking and at least one of the enumerated aggravators. The penalty for second-degree stalking is the same as that already provided in Idaho Code.

FISCAL IMPACT

The fiscal impact is difficult to determine with certainty as it depends upon the increased number of offenders charged with and convicted of felony stalking. The impact to the general fund will be equal to the cost of imprisoning the additional number of offenders, if any, charged, convicted and sentenced to prison under the revised felony section of this code.

Contact
Name: Representative Debbie Field
Phone: 332-1000

APPENDIX B

RS13623C1 Chairman Field called on Representative Rydalch. Representative Rydalch said this proposed change to the office of the Attorney General will provide that a department, agency, office, officers, board, commission, institution or other state entity may be represented by or obtain its legal advice from either the Attorney General's office or from an attorney at law in the private sector. This proposed legislation would allow state entities to make a choice on who would represent them. Representative Clark said there is a technical problem with this change. It would result in a large fiscal impact instead of a revenue neutral impact. Representative Pasley-Stuart registered her concern regarding the proposed legislation.

MOTION: Representative Nielsen moved **to introduce RS13623C1.** Roll call vote was requested.

ROLL CALL VOTE: Voting AYE-Representatives Ellsworth, Ridinger, Nielsen, Shirley. Voting NAY-Representatives Field, Clark, Sali, Smith, Harwood, Kulczyk, Ring, Wills, Boe, Andersen, Pasley-Stuart. **MOTION FAILED 4-11-1.**

RS13730: Chairman Field recognized Heather Reilly to explain the proposed legislation. Ms. Reilly said this legislation divides the crime of stalking into first-degree and second-degree stalking. First-degree stalking is a felony which is committed when an individual commits second-degree stalking and one of the aggravating factors is present as enumerated in the proposed legislation. Such factors include stalking a victim who is under sixteen and the stalking of a victim against whom certain crimes have already been committed by the perpetrator. The penalty for second-degree stalking is the same as that already provided in Idaho Code. Stalking in the first degree is punishable by a fine not exceeding ten thousand dollars, or imprisonment in the state prison for not less than one year nor more than five years, or by both such fine and imprisonment. Definitions are also provided for "family member" and "nonconsensual contact."

MOTION: Representative Ring moved **to introduce RS13730. Motion carried.**

PRESENTATION Chairman Field recognized Olivia Craven to update the members on the State of the Commission of Pardons & Parole. Ms. Craven said the Legislature saw fit to increase the number of employees of the Commission. As a result, the Commission has been able to take on more duties and help out the Department of Corrections. Crimes of violence always come before the Commission. Parole determination is at the complete discretion of the Commission. Parolees must serve one year on parole. The Commission does a lot in the area of restitution and it is working to make sure inmates are out when they are supposed to be. Drug courts are having a very positive effect in helping to keep people out of prison. Programs need to continue to be provided and structured reentry into the workplace is most important. Inmates receive vocational training once they have been tracked in the rehabilitation program.

ADJOURN: Chairman Field thanked Ms. Craven and told the members that the Thursday meeting will be the last day to hear personal legislation. The Chair said there are four important issues facing the Committee. A task force needs to be made up to study each issue. The issues are: estate

APPENDIX C

PRO: Kathy Figueredo was recognized. Ms. Figueredo said her daughter was murdered. The daughter had been a vital part of the family and of Mountain Home. It is essential for victim's families to have a voice. This legislation will give our citizens a voice in order to speak for those who are murdered.

PRO: Jessica Terry was recognized. Jessica's sister was murdered. She was before the Committee to speak on behalf of her sister. This legislation would allow victim impact information which is very important in these cases.

PRO: Darlene Shaw was recognized. Ms. Shaw said she was here today to ask the committee to vote for this bill so that family members will have a voice to provide an impact on the trial. Her daughter was a victim at 13 years of age.

MOTION: After a discussion on the importance of getting the bill into law, Representative Wills moved **to send H 609 to General Orders with an emergency clause added. Motion carried.** Representative Wills will carry the bill on the floor.

H 642: Representative Wills was recognized. This bill simply says the Supreme Court will have the discretion to set the period of time that an administrative judge will serve. This will assure a greater depth of experience and continuity of leadership in carrying out Supreme Court policies and the duties of their office.

MOTION: Representative Clark moved **to send H 642 to the floor with a Do Pass recommendation. Motion carried.** Representative Wills will carry the bill on the floor.

H 644: Representative Shirley was recognized. This bill will assist counties in recovering some of their cost of providing court generated legal forms and written materials, training covering the application and use of these documents, and other services provided in connection with court assistance offices and coordinated family services. Representative Shirley gave each member an Executive Summary (attached.) The fees established by the Supreme Court will be reasonably related to and will not exceed the actual costs involved in furnishing the forms or providing the other services.

MOTION: Representative Clark moved **to send H 644 to the floor with a Do Pass recommendation. Motion carried.** Representative Shirley will carry the bill on the floor.

H 668: Heather Reilly was recognized to explain the legislation. Ms. Reilly said she was presenting the bill at the request of Representative Field. This legislation repeals Section 18-7905, Idaho Code, relating to stalking, and adds a new section 18-7905 to provide for the crime of stalking in the first degree and to define terms and set forth punishment. Chapter 79, Title 18, Idaho Code, is amended by the addition of a new section, 18-7906, to provide for stalking in the second degree, to define terms and to set forth punishment. Section 19-603 is amended to provide a code reference and descriptive language.

PRO: Kathy Peterson was recognized to give her testimony. Ms. Peterson said she is a victim of stalking. A former fiancé threatened her life. He conned her out of around forty thousand dollars and carved on his belt that she would die when she broke up with him. The judges in misdemeanor court did not seem to take the matter very seriously. She had a civil restraining order which he violated. He also violated a no contact order. He has been in and out of mental hospitals. He has also made threats to others. In conclusion Ms. Peterson asked that the law be changed by passing this bill. It is necessary to tell the perpetrators that this type of stalking is a serious crime. It needs to be a felony.

PRO: Heather Reilly was recognized to respond to questions asked by the committee. She confirmed that the language on page 2, lines 12 and 13 would require proof of some kind of intent to use the deadly weapon or instrument, a brandishing or some other similar serious act, in order to be an aggravating circumstance sufficient to elevate a second degree stalking charge to stalking in the first degree. Ms. Reilly also confirmed that the less serious crimes included in Chapters 9, 15 and 61 of Title 18 would not be sufficient to elevate a second degree stalking charge to stalking in the first degree.

MOTION: Representative Sali moved **to send H 668 to the floor with a Do Pass recommendation. Motion carried.** Representative Field will carry the bill on the floor.

ADJOURN: Prior to adjourning, Chairman Field said the time has been reached when the committee must move along on the bills. We will try to hear the remainder of the bills in the committee by the end of February. There will be a meeting on Friday, February 27, immediately upon adjournment. There being no further business to come before the committee, the meeting was adjourned at 3:45 p.m.

Representative Debbie Field
Chairman

Betty Baker
Secretary

APPENDIX D

MINUTES

SENATE JUDICIARY AND RULES COMMITTEE

DATE:	March 3, 2004
TIME:	1:30 p.m.
PLACE:	Room 437
MEMBERS PRESENT:	Chairman Darrington, Vice Chairman Lodge, Senators Sorensen, Richardson, Bunderson, Davis, Sweet, Marley, Burkett
MINUTES:	**Senator Lodge** made a motion to accept the minutes of March 1 as written. Second was by **Senator Richardson** and the motion carried by a voice vote.
RS14217	To establish a study committee to undertake and complete a study of the statutes governing charter schools. This bill will be referred to the Education Committee.
RS14229	Provides for definitions of specialty journeymen and apprentices. This bill will be referred to the Commerce Committee.
RS14234	Relating to the Idaho Transportation Board, the State Highway Account and the Idaho Housing and Finance Assn. to utilize bonds or notes to finance projects for transportation infrastructure. This bill will be referred to the Transportation Committee.
MOTION:	**Senator Davis** made a motion to send RS14217, RS14229 and RS14234 to print. Second was by **Senator Richardson** and the motion carried by a voice vote.
S1407	Patti Tobias presented this bill for the Idaho Supreme Court, that will This bill will increase the annual salary of justices of the supreme court, judges of the court of appeals, district judges, and attorney and nonattorney magistrate judges by two percent (2%) beginning July 1, 2004. Presently there are no nonattorney magistrate judges serving full-time in the state of Idaho. However, the annual salary of this category of judge must keep pace with salary increments granted to other categories of judges in order to adequately compensate retired nonattorney magistrate judges who are called in to service on a temporary basis under Section 1-2221, Idaho Code. The two percent (2%) salary increase for justices and judges will cost $279,700.00, which is funded from the general fund and was approved by JFAC last week.
MOTION:	**Senator Davis** made a motion to send S1407 to the floor with a do pass. Second was by **Senator Sweet** and the motion carried by a voice vote.
H668	**Representative Debbie Field** presented this bill that was drafted after a call from a woman who was stalked for over 10 years and the statutes in Idaho couldn't help her. The law needed to be taken one step further and this legislation will do that by breaking stalking out into first-degree and second-degree stalking. First-degree stalking is a felony and is committed

when an individual commits second-degree stalking and at least one of the enumerated aggravators. The penalty for second-degree stalking is the same as that already provided in Idaho Code.

Representative Field told the committee that she had put several of their phone numbers into a Google Search and found 2 pages of information on them including a map to their homes. She said that it is very easy to find a person and the law needs to be tougher for those that do.

Kathy Peterson, the victim of stalking that called Chairman Field, told the committee that she was engaged to a man, who borrowed $40,000 from her and when she broke up with him, would not quit harassing her. She made police reports, but was told that the City didn't have the money or the manpower to do forensics to determine if it was her former fiancé. She paid for her own forensics and it proved to be Jeff Richland, as she thought. The judge suspended any sentence, there was no fine or penalty, and she was made to feel like she was pushing a mute issue. Jeff married many times, and had threatened ex-girlfriends as recently as 6 months ago, some of whom are trying to help Ms. Peterson.

Senator Darrington told Ms. Peterson that the committee was concerned that the stalking law put on the books about ten years ago is not adequate.

Heather Reilly, Idaho Prosecuting Association supports the bill. She said that they had looked at the bill and given their input. At a recent stalking conference there was a concern about the technology for use with Global Satellite Positioning systems (GPS), so now the language can include "by electronic means".

Ms. Reilly presented a sheet of stalking facts. (See attached #1) While legal definitions of stalking vary from one jurisdiction to another, stalking generally refers to a course of conduct that involves a broad range of behavior directed at the victim. The conduct can be as varied as the stalker's imagination and ability to take actions that harass, frighten threaten and/or force himself or herself into the life and consciousness of the victim. The report states that 1,006,970 women and 370,990 men are stalked annually in the United States, and 77% of female as well as 64% of male victims know their stalker. Stalking is a crime under the laws of all 50 states, and the District of Columbia and stalking is considered as a felony upon the first offense in 14 states. Thirty-four states classify stalking as a felony upon the second offense and/ or when the crime involves aggravating factors. Aggravating factors may include: possession of a deadly weapon; violation of a court order or condition of probation/parole; victim under 16; and same victim as prior occasions.

Senator Burkett asked why there was such an expansive definition of family, and especially including roommates. Ms. Reilly said that a lot of victims are in college and it is common for stalkers to go to a residence and make roommates the subjects of the harassment. The intent of this bill is to include people that are in contact with the target to protect them. She told the committee that she felt this bill was an improvement in the

law.

MOTION: **Senator Burkett** made a motion to send H668 to the floor with a do pass. Second was by **Senator Lodge** and the motion carried by a voice vote. **Senator Burkett** and **Senator Lodge** will co-sponsor this bill on the Senate floor.

H519 Major Ralph Powell, Idaho State Police presented this bill whose purpose is to seek restitution for the analysis of controlled substances for conviction on misdemeanor drug offenses as well as felony drug offenses. The laboratory incurs the same analysis expense regardless of whether the evidence results in a felony or misdemeanor conviction.

Idaho Code allows restitution to be sought from offenders, upon sentencing, for the analysis of felony controlled substances. Restitution amounts paid to the Idaho State Police are deposited into the drug enforcement donation fund which are used to pay a portion of the cost to analyze drug evidence submitted by law enforcement agencies; purchase, repair and maintain instruments, equipment and supplies; and pay for training and general operations/maintenance of the laboratory.

It is estimated that this proposal may generate up to $50,000 annually for the Idaho State Police. These funds will be added to the Drug Enforcement Donation Account as outlined in the Funds Consolidation Act, Idaho Code 57-816. The Joint Finance Appropriation Committee has given authority for this. Major Powell said that for $100 analyzed sample, they get $16.50.

MOTION: **Senator Lodge** made a motion to send H519 to the floor with a do pass. Second was by **Senator Sorensen** and the motion carried by a voice vote. **Senator Lodge** will carry this bill on the Senate floor.

H520 Colonel Dan Charboneau, Idaho State Police presented this bill relating to the Idaho DNA database Act of 1996. He introduced the director of the DNA , Cindy Hill.

This proposed amendment to the statute provides for the addition of two new classes of offenders subject to sample collection: felony burglary and felony domestic violence; and provides that persons may be ordered by the court to pay restitution to help offset costs incurred by law enforcement agencies for the expense of DNA analysis. Burglars are known to have a high correlation with rape, and DNA database research has proven this.

A review of the state of Virginia database showed that nearly half of all the hits on unsolved rapes come from offenders with prior burglary convictions. Domestic assaults likewise are violent crimes often leading to rape or homicide. Inclusion of these crime categories in the DNA database will increase law enforcement's ability to identify and more quickly bring to justice the perpetrators of violent crimes. Idaho is now on line with STR (Short Tandem Repeat) DNA analysis and CODIS (Combined DNA Index System), and can provide DNA analysis on samples submitted for a variety of crimes. DNA analysis is a costly

Attachment #1

Stalking resource center

www.ncvc.org/src
Tel. (202) 467-8700
E-mail: src@ncvc.org

stalking fact sheet

THE NATIONAL CENTER FOR Victims of Crime

Crime victims can call:
1-800-FYI-CALL
for assistance
M-F 8:30 AM – 8:30 PM

WHAT IS STALKING?

While legal definitions of stalking vary from one jurisdiction to another, stalking generally refers to a course of conduct that involves a broad range of behavior directed at the victim. The conduct can be as varied as the stalker's imagination and ability to take actions that harass, frighten, threaten and/or force himself or herself into the life and consciousness of the victim.

Adapted from: US Department of Justice. (2001). *"Report to Congress on Stalking and Domestic Violence."*

STALKING IN AMERICA

- 1,006,970 women and 370,990 men are stalked annually in the United States.
- 1 in 12 women and 1 in 45 men will be stalked in their lifetime.
- 77% of female and 64% of male victims know their stalker.
- 87% of stalkers are men.
- 59% of female victims and 30% of male victims are stalked by an intimate partner.
- 81% of women stalked by a current or former intimate partner are also physically assaulted by that partner.
- 31% of women stalked by a current or former intimate partner are also sexually assaulted by that partner.
- 73% of intimate partner stalkers verbally threatened the victims with physical violence, and almost 46% of victims experienced one or more violent incidents by the stalker.
- The average duration of stalking is 1.8 years.
- If stalking involves intimate partners, the average duration of stalking increases to 2.2 years.
- 61% of stalkers made unwanted phone calls; 33% sent or left unwanted letters or items; 29% vandalized property; and 9% killed or threatened to kill a family pet.
- 28% of female victims and 10% of male victims obtained a protective order. 69% of female victims and 81% of male victims had the protection order violated.

Tjaden & Thoennes. (1998). "Stalking in America," NIJ.

STATE LAWS*

- Stalking is a crime under the laws of all 50 states, the District of Columbia, and the Federal Government.
- 14 states classify stalking as a felony upon the first offense.*
- 34 states classify stalking as a felony upon the second offense and/or when the crime involves aggravating factors.*
- Aggravating factors may include: possession of a deadly weapon; violation of a court order or condition of probation/parole; victim under 16; same victim as prior occasions.

* For a complete list of state, tribal and Federal laws visit: *www.ncvc.org/src*
* Last updated March 2003

THE STALKING RESOURCE CENTER

The Stalking Resource Center is a program of the National Center for Victims of Crime. Our dual mission is to raise national awareness of stalking and to encourage the development and implementation of multidisciplinary responses to stalking in local communities across the country. We can provide you with:

- Training
- Technical Assistance
- Protocol Development
- Resources
- Help in collaborating with other agencies and systems in your community

Contact us at: 202-467-8700 or *src@ncvc.org*.

TYPOLOGIES OF STALKERS*

- Simple obsessional stalkers are the most common type. They have some prior relationship with the victim, usually an intimate one. These cases most often occur in the context of domestic violence.
- Love obsessional stalkers have had no existing relationship with the victim. Many of these stalkers target celebrities.
- Erotomanic stalkers delusionally believe that they are loved by the victim. This is the rarest category of stalkers.

* Individual perpetrators may not precisely fit any single stalker category, and often exhibit characteristics associated with more than one category; it is important to remember that these typologies are merely guides.
Meloy. (1998). "The Psychology of Stalking," AP.

THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN

- 13% of college women were stalked during one six to nine month period.
- 80% of campus stalking victims knew their stalkers.
- 3 in 10 college women reported being injured emotionally or psychologically from being stalked.

Fisher, Cullen, and Turner. (2000). "The Sexual Victimization of College Women," NIJ/BJS.

IMPACT OF STALKING ON VICTIMS

- 56% of women stalked took some type of self-protective measure; often as drastic as relocating (11%). (Tjaden & Thoennes. (1998). "Stalking in America," NIJ)
- 26% of stalking victims lost time from work as a result of their victimization, and 7% never returned to work. (Tjaden & Thoennes.)
- 30% of female victims and 20% of male victims sought psychological counseling. (Tjaden & Thoennes.)
- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims than the general population, especially if the stalking involves being followed or having one's property destroyed. (Blauus et. al. (2002). "The Toll of Stalking," *J. Interpersonal Viol.*)

STALKING & INTIMATE PARTNER FEMICIDE*

- 76% of femicide victims had been stalked.
- 67% had been physically abused by their intimate partner.
- 89% of femicide victims who had been physically abused had also been stalked in the 12 months before the murder.
- 79% of abused femicide victims reported stalking during the same period that they reported abuse.
- 85% of attempted femicide cases involved at least one episode of stalking within 12 months prior to the attempted femicide.
- 54% of femicide victims reported stalking to police before they were killed by their stalkers.

* The murder of a woman
McFarlane et al. (1999). "Stalking and Intimate Partner Femicide," Homicide Studies.

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